(3)

No. 89-283

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMY TRAVEL SERVICES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), which expressly authorizes a court to issue "a permanent injunction," implicitly forbids a court from awarding other ancillary equitable relief.

2. Whether the district court erred in holding the individual petitioners liable for the unlawful conduct of the corporations they owned and controlled where they had knowledge of the violations, participated in them, and failed to bring them to a halt.

3. Whether the district court erroneously excluded testimony that the individual petitioners relied on the advice of counsel.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 118, Exh. 3, is reported at 875 F.2d 564. The district court's findings of fact, conclusions of law, and final order, Pet. App. 1-117, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1989. The petition for a writ of certiorari was originally filed on July 17, 1989. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the Northern District of Illinois found that petitioners deceived consumers in violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45. The court issued a permanent injunction forbidding petitioners from committing further violations of the FTC Act and ordered petitioners to pay $6,629,100 in restitution to consumers. Pet. App. 1-117. The court of appeals affirmed.

1. Petitioners are the corporations Amy Travel Service, Inc. (Amy), Resort Performance, Inc., and Resort Telemarketing, Inc., and the individuals Thomas P. McCann (McCann) and James F. Weiland (Weiland).

In 1985, petitioners McCann and Weiland formed a business to sell travel certificates, also known as "vacation passports." Each passport consisted of two pages of written material and described vacation packages to nine different resort locations, including Acapulco, Jamaica, Hawaii, and London, among others. The passport stated that it "entitle[d] the adult holder(s) to receive two round-trip air tickets plus lodging for 8 days and 7 nights for the price not to exceed one unrestricted round-trip, standard, all-year, full-economy (Y-class) airfare." Petitioners sold their passports to consumers for $289 to $329. Pet. App. 10, 13-18, Exh. 3, at 2, 3-4 (emphasis omitted).

In 1986, McCann and Weiland opened a "telemarketing" office to sell vacation passports by telephone directly to consumers. McCann and Weiland eventually opened eight additional telephone sales rooms. All of these offices were managed by McCann

and Weiland, and all were operated as a single entity in all material respects. Pet. App. 10-12, Exh. 3, at 2-3.

To promote telephone sales, petitioners McCann and Weiland developed scripts to be used by their sales agents. The basic script falsely represented that the offer was being made to only a few special customers and suggested that the consumer was required to "qualify," a hurdle that was easily surmounted by answering yes to a few simple questions. That script then told the consumer that he or she was being offered a "special vacation voucher to Hawaii for only $329.90." Later on, that script indicated that the price of the voucher entitled the consumer to a fully paid vacation for eight days and seven nights, plus two round-trip airfares, at a cost not to exceed one "unrestricted round-trip (Y-class) full economy airfare." By design, the script did not disclose the cost of the Y-class airfare and, therefore, concealed the total cost of the vacation. Pet. App. 18-22, Exh. 3, at 4-7 (emphasis omitted).[1]

Petitioners' marketing practices misled consumers about the true cost of the vacation package. Many consumers reasonably believed that the cost of the entire package was the $289-$329 cost of the passport, which they also understood to be the price of one unrestricted economy airfare. Even consumers who recognized that there was an additional charge—up to the cost of a "full-economy (Y-class) airfare"—

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[1] Moreover, many of the sales scripts used by petitioners deviated from the basic script described above and falsely represented to the consumer that "you have been computer selected thru [*sic*] a major credit card company to be offered a fully paid vacation to Hawaii, for only $289.90." Pet. App. 23, Exh. 3, at 7 (emphasis omitted).

were misled into believing the trip was a bargain. In fact, unbeknownst to most consumers, the Y-class airfare, far from being an "economy" fare as characterized by petitioners, is the highest priced coach airfare available. Pet. App. 72-73, Exh. 3 at 9. Indeed, a Y-class airfare often costs three or more times as much as other airfares and two to five times as much as the passport. Because petitioners concealed this fact prior to purchase, it was not until most consumers had actually purchased their passport and sought to book their flight and accommodations that they learned the actual cost of their vacation and realized how expensive it was in relation to other readily available alternatives.[2] This concealed cost helps explain why, although approximately 60,000 passports were sold, only 12,000 to 13,000 trips were taken. Petitioners' activities generated gross revenues of about $1.5 million in 1986 and $4.5 million in 1987. Pet. App. Exh. 3, at 8.

Petitioners were well aware from the inception of their scheme that they were deceiving consumers. Customer complaints about misrepresentations began almost immediately. In addition, large numbers of consumers disputed the charges made to their accounts, resulting in chargebacks to petitioners' bank accounts when consumers refused to pay. A number of banks terminated petitioners' accounts because of these consumer complaints and chargebacks. One

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[2] For example, the round-trip Y-class airfare from Washington, D.C. to Honolulu on a particular date was $1,936 (not including the approximately $300 cost of the passport). At the same time, a full vacation package for two to Waikiki, including accommodations for seven nights and airfare, could be purchased from a legitimate travel agent for $1,198. Pet. App. 50-52, 70-73, 78-79, Exh. 3, at 9-10; see Pet. App. 25-36.

bank eventually suffered more than $700,000 in chargebacks. Pet. App. 89, 91, Exh. 3, at 8-9.

2. On August 3, 1987, the Federal Trade Commission (Commission) filed a complaint, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), alleging that petitioners were engaged in unfair and deceptive marketing practices in violation of Section 5 of that Act, 15 U.S.C. 45. Pet. App. Exh. 3, at 10.

After a one-week trial, the district court (by a designated magistrate) found petitioners to have engaged in deceptive practices by (1) misrepresenting and deceptively failing to disclose the full cost of their vacations and (2) misrepresenting their billing practices and billing consumers without authorization. The court entered an order permanently enjoining petitioners from engaging in those practices, rescinding the outstanding, unused vacation passports, and requiring restitution of $6 629,100, which represented the amount of money petitioners collected from consumers for unused passports. The court held petitioners jointly and severally liable for the restitution. Pet. App. Exh. 3, at 11-12. See Pet. App. 1-117.

3. The court of appeals affirmed. First, it rejected petitioners' challenge to the authority of the district court to award monetary equitable relief (*i.e.*, rescission and restitution) ancillary to a permanent injunction. The court observed that "[a]ll other circuits that have dealt with this issue have found that section 13(b) grants the authority to issue other necessary equitable relief." Pet. App. Exh. 3, at 13. Relying on the decisions of those other circuits as well as its own precedents, the court of appeals held that Section 13(b) authorized the award of ancillary equitable relief such as rescission and restitution. Pet. App. Exh. 3, at 12-14.

The court of appeals also rejected petitioners' contention that the magistrate erred by holding the individual petitioners jointly and severally liable. It found that the individual petitioners knew or should have known of the unlawful practices perpetrated by the corporations they managed and controlled, and either participated directly in them or had the authority to stop them and failed to do so. Pet. App. Exh. 3, at 16-21.

In addition, the court of appeals rejected petitioners' claim that the magistrate erred by excluding certain evidence that they relied on the advice of counsel. According to the court, "[t]he magistrate correctly found that the blessing of an attorney did not make the telemarketing scripts truthful"; "counsel could not sanction something that the [petitioners] should have known was wrong." Pet. App. Exh. 3, at 21. In the court's view, the record and the magistrate's opinion demonstrated that "the magistrate was sufficiently aware of [petitioners'] efforts to get counsel's approval" and did not err in excluding certain testimony as irrelevant. *Id.* at 21 n.8.[3]

ARGUMENT

1. Petitioners maintain that the district court lacked authority to order restitution under Section 13(b) of the FTC Act, 15 U.S.C. 53(b). Pet. 10-55. That Section provides that "in proper cases the Commission may seek, and after proper proof, the court

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[3] The court of appeals also rejected petitioners' contentions that the magistrate erred in excluding certain evidence, Pet. App. Exh. 3, at 14-16; that an asset freeze prevented them from paying attorney's fees, *id.* at 21-22; and that the magistrate erred in admitting consumer affidavits, *id.* at 22-24. Petitioners do not seek further review of those issues.

may issue, a permanent injunction." Petitioners argue that by expressly authorizing a permanent injunction, the statute impliedly forbids the award of any other equitable relief, including the rescission and restitution ordered in this case. Pet. 16. Petitioners' exclusion-by-implication reasoning is contrary to this Court's decisions construing statutes authorizing equitable remedies.

a. It is well established that where Congress allows resort to equity for enforcement of a statute, all the inherent equitable powers of the district court are available for the proper and complete exercise of the court's equitable jurisdiction, unless the statute explicitly or by inescapable inference limits the scope of that jurisdiction. *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 19-20 (1974); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-291 (1960); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 11 (1942). As this Court stated in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946):

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. * * * [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.

Id. at 398 (internal quotation marks and citations omitted). Petitioners concede that *Porter* provides the applicable rule of construction in this case. Pet. 21-22.

Section 13(b) expressly authorizes permanent injunctive relief and neither expressly nor implicitly excludes the award of ancillary equitable relief. Consistent with this Court's decisions, every court that has considered the question—including three courts of appeals—has held that the district court is authorized to grant ancillary equitable relief under Section 13(b). *FTC* v. *World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *FTC* v. *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-1435 (11th Cir. 1984); *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1110-1112 (9th Cir. 1982); *FTC* v. *Atlantex Associates*, 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,253 (S.D. Fla. 1987), aff'd, 872 F.2d 966 (11th Cir. 1989); *In re Evans Products Co.*, 1986-1 Trade Cas. (CCH) ¶ 67,113 at 62,722-62,723 (S.D. Fla. 1986); *FTC* v. *International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,506 at 68,457-68,458 (N.D. Cal. 1983); *FTC* v. *Virginia Homes Manufacturing Corp.*, 509 F. Supp. 51, 54-55 (D. Md.), aff'd, 661 F.2d 920 (4th Cir. 1981) (Table). See *FTC* v. *Evans Products Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985).

In this case, the district court determined that "[t]his record demonstrates a proper case for restitution to consumers who were billed either without their knowledge or consent or with consent but based on false representations made to them." Pet. App. 95. The court calculated the amount of restitution by adding the number of consumers who requested refunds but did not receive them and the number of consumers who purchased passports and requested vacations but did not travel, and then multiplying this sum by the estimated average cost of a vacation passport. *Id.* at 108. The district court's restitution award is unquestionably fair. As the court of appeals noted, the magistrate "limit[ed] the relief to those customers who received nothing of value for the price of the vacation passport. Customers, satisfied or unsatisfied, who took trips were excluded from the computation of relief." Pet. App. Exh. 3, at 15 n.7.

b. Petitioners' reading of Section 13(b) to exclude by implication ancillary equitable relief contradicts the *Porter* principle. For example, petitioners emphasize that the statute authorizes only a "permanent injunction." But their effort to characterize that language as narrow, Pet. 22-26, simply disregards the relevant canon of construction. That language, like the language of other statutes authorizing a particular equitable remedy, invokes the full equitable jurisdiction of the district court. See, *e.g.*, *CFTC* v. *Hunt*, 591 F.2d 1211, 1223 (7th Cir.), cert. denied, 442 U.S. 921 (1979); *FSLIC* v. *Dixon*, 835 F.2d 554, 560-563 (5th Cir. 1987); *ICC* v. *B & T Transportation Co.*, 613 F.2d 1182, 1184-1186 (1st Cir. 1980); *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.), cert. denied, 404 U.S. 1005 (1971). For the same reason, petitioners' reliance on minor variations in language is misplaced: as long as the statute

authorizes an equitable remedy, as Section 13(b) clearly does, the district court may exercise the full sweep of its equitable powers. *FSLIC* v. *Dixon*, 835 F.2d at 561-562. See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. at 289-293; see also *CFTC* v. *Hunt*, 591 F.2d at 1223.

Nor do other provisions of the FTC Act imply that Congress intended to bar the award of ancillary equitable relief, as petitioners claim. Pet. 25-28. Section 13(b), in addition to authorizing permanent injunctions, provides that "[u]pon a proper showing * * * a temporary restraining order or a preliminary injunction may be granted without bond." 15 U.S.C. 53(b). According to petitioners, the precise wording of the provision authorizing a preliminary injunction implies that it should be read narrowly. Reading the provision authorizing a preliminary injunction *in pari materia* with that authorizing a permanent injunction, petitioners argue that the latter provision, like the former, should be limited to its precise terms. The flaw in this logic, however, begins with the initial premise: the language authorizing preliminary injunctions is no narrower than that authorizing permanent injunctions. Indeed, courts have uniformly construed the preliminary injunction provision to authorize the award of the full range of equitable remedies. See *FTC* v. *Southwest Sunsites, Inc.*, 665 F.2d 711, 717-722 (5th Cir.), cert. denied, 456 U.S. 973 (1982); see also *FTC* v. *Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989); *FTC* v. *Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981).

The language of Section 19 of the FTC Act, 15 U.S.C. 57b, similarly fails to create the necessary inference that Section 13(b) is to be limited to the precise relief there described. Petitioners argue that because Section 19(b), 15 U.S.C. 57b(b), explicitly

authorizes "rescission" and the "refund of money," the failure to list such remedies in Section 13(b) evidences an intent to exclude such remedies as ancillary to the award of a permanent injunction. Contrary to petitioners' assumption, however, Section 19(b) and Section 13(b) are not simply alternative sources of remedies from which one could reason that their explicit availability in the former section impliedly excludes them in the latter section. Section 19 empowers the Commission to seek judicial redress on the basis of conclusive findings of illegality made by the Commission in an administrative adjudication. In a permanent injunction action under Section 13(b), by contrast, the court determines both liability and remedy. That Section 19 speaks with great specificity, while Section 13(b) does not, is thus no reason to restrict the latter's scope—the two sections serve entirely different purposes. Congress recognized this difference and expressly disavowed petitioners' construction by means of a "savings clause." Section 19(e), 15 U.S.C. 57b(e), ~~which~~ specifies that:

> Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authoritv of the Commission under any other provision of law.

As the court of appeals in *FTC* v. *H.N. Singer, Inc.*, 668 F.2d at 1113, correctly observed, the savings clause rejects the inference that Congress intended to restrict the equitable remedies provided by Section 13(b) when it created the novel hybrid adjudication in Section 19.

Petitioners' reliance on the legislative history of the permanent injunction provision is similarly misplaced. Pet. 28-33. Courts have consistently ruled that nothing in the legislative history rebuts the pre-

sumption that ancillary equitable relief is available in a permanent injunction action brought under Section 13(b). *E.g.*, *FTC* v. *H.N. Singer, Inc.*, 668 F.2d at 1110-1111; *FTC* v. *World Travel Vacation Brokers, Inc.*, 861 F.2d at 1027-1028. The only portion of the legislative history of Section 13(b) that discusses the permanent injunction provision (which is quoted in full in *Singer*, 668 F.2d at 1110-1111) provides several illustrative examples of situations in which a permanent injunction would be "proper," including cases of routine fraud. If the legislative history shows anything, it makes clear that Congress considered the permanent injunction remedy to be proper in that class of cases—ongoing routine fraud of the kind involved here—in which a preliminary injunction and monetary equitable relief are particularly appropriate. The legislative history neither expressly nor by inescapable inference limits the courts' equitable powers under Section 13(b).

2. Contrary to petitioners' contention, Pet. 52-63, both the court of appeals and the district court applied the correct legal standard in holding the individual petitioners liable for restitution for violations of the FTC Act committed by the corporations under their control. Pet. App. Exh. 3, at 19-21. An individual, such as a corporate officer or manager, is liable for restitution if he knew or should have known of the corporation's misrepresentations and either directly participated in them or possessed the authority to control them and failed to do so. See, *e.g.*, *FTC* v. *Atlantex Associates*, 1987-2 Trade Cas. (CCH) ¶ 67,788, at 59,254-59,255 (S.D. Fla. 1987), aff'd, 872 F.2d 966 (11th Cir. 1989); *FTC* v. *Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292-1293 (D. Minn. 1985); *FTC* v. *International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,506 at 68,458 (N.D.

Cal. 1983); *FTC* v. *H.N. Singer, Inc.*, 1982-1983 Trade Cas. (CCH) ¶ 65,011 at 70,619 (N.D. Cal. 1982).[4]

As their opinions amply demonstrate, both the court of appeals and the district court properly applied this well-established principle in assessing the liability of the individual petitioners. Pet. App. 83-92, Exh. 3, at 17-19. The record evidence established that McCann and Weiland designed and supervised the telephone sales operation on a day-to-day basis; they wrote the deceptive scripts and therefore knew of the material misrepresentations and omissions upon which the scripts were based; they were aware of the high volume of customer complaints and the excessive chargebacks which resulted from the deceptive scripts and the embellishing misrepresentations employed by the telemarketers; and by their own admission they had authority to control the deceptive sales operation. Pet. App. Exh. 3, at 19.[5]

[4] Contrary to petitioners' contention, Pet. 58-61, the courts clearly required the Commission "to establish the defendants had or should have had knowledge or awareness of the misrepresentations." Pet. App. Exh. 3, at 18. However, the court of appeals properly rejected petitioners' argument that the Commission must prove subjective intent to defraud on the part of the individual defendants, holding instead that:

> [the] knowledge requirement may be fulfilled by showing that the individual had "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." Also, the degree of participation in business affairs is probative of knowledge.

Ibid. (citations omitted).

[5] Despite petitioners' attempts to minimize the role (and, thus, the knowledge) of petitioner Weiland, the record re-

As both courts correctly observed: "'[O]ne may not enjoy the benefits of fraudulent activity and then insulate one's self from liability by contending that one did not participate directly in the fraudulent practices.'" *Ibid.* Petitioners' fact-bound contention does not merit further review.

3. Petitioners assert that the magistrate erroneously excluded certain testimony offered by petitioners to prove that they relied on the advice of counsel. That evidence was properly excluded as cumulative and redundant. According to the court of appeals: "An examination of the record and the trial court's opinion shows that the magistrate was sufficiently aware of [petitioners'] efforts to get counsel's approval of corporate practices." Pet. App. Exh. 3, at 21 n.8. In addition, exclusion of petitioner's additional advice-of-counsel testimony did not prejudice petitioners. Both the magistrate and the court of appeals assumed that petitioners had relied on the advice of counsel. They determined, however, that "reliance on advice of counsel was not a valid defense on the question of knowledge; counsel could not sanction something that the [petitioners] should have known was wrong." *Id.* at 21. Finally, because petitioners present no argument or authority to support their assertion, there is no reason to review the conclusion of the lower courts that that testimony was properly excluded. See Sup. Ct. R. 21.1(j), 21.5.

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flects that Weiland was a principal shareholder and officer of the corporations and, together with petitioner McCann, created and developed the business, controlled its financial affairs, wrote the deceptive sales scripts, and reviewed the sales reports and other information. Pet. App. 88-89, Exh. 3, at 19-20. Moreover, Weiland regularly consulted with McCann regarding the daily sales operation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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